LAKSHMI MALAYANDY v. EK HOUSING DEVELOPER SDN BHD & ORS

HIGH COURT MALAYA, SHAH ALAM
AZIMAH OMAR JC
[CIVIL SUIT NO: 22NCVC-201-04-2014]
17 NOVEMBER 2014

CIVIL PROCEDURE: *Limitation – Action to recover land – 12 years limitation period – Right of action accruing upon infringement or threat to infringe right over land – Whether limitation period extended by acknowledgement – Whether valid and effective acknowledgement proven – Whether acknowledgement resulted in fresh accrual of right of action – Limitation Act 1953, ss. 9(1), 26*

The first defendant was a property developer company, while the second and third defendants were the former directors of the first defendant. The fourth defendant was the administrator of the estate of one Sin Bin ('the deceased') and the fifth defendant was a financial banking institution. The plaintiff claimed that she was the rightful owner of a piece of property ('the said property') and that she had, sometime in 1987, engaged the first defendant as a contractor to build a bungalow on the said property. According to the plaintiff, the first, second and third defendants had fraudulently transferred the said property to the first defendant by way of a forged power of attorney allegedly signed by the plaintiff. It was further alleged by the plaintiff that the first defendant had then sold and transferred the said property to the deceased. The deceased was the present registered owner of the said property. The fifth defendant had extended a loan facility to the first defendant and later to the deceased. Currently, the fifth defendant was the registered chargee to the said property. The fifth defendant pleaded that the plaintiff's claim was time-barred. The fifth defendant thus filed an application under O. 14A posing the question of law: whether the plaintiff's purported claim against the fifth defendant was time-barred pursuant to the Limitation Act 1953 ('the Act'). The plaintiff contended that there was a fresh accrual of action by acknowledgement pursuant to s. 26 of the Act on the grounds that the deceased had acknowledged on 1 September 2009 that there was fraudulent act on his part over the said property and had given his promise to the plaintiff that he will transfer and register the said property to the plaintiff. By this acknowledgement, it was submitted that the plaintiff's cause of action had accrued afresh, and would only start to run from 1 September 2009 and will lapse in 2021.

Held (allowing fifth defendant's application with costs):

(1) The plaintiff's action was an action to recover land. Therefore, the time limited for the plaintiff to file her action was 12 years pursuant to s. 9(1) of the Act from the date when right of action accrued. In an action to

recover land, the right of action accrues when there is an infringement of such right or at least clear and unequivocal threat to infringe that right by the defendant against whom the suit is instituted. (para 27)

(2) The plaintiff knew and/or discovered the alleged forgery and/or fraud at least by 9 February 1994 when she lodged a private caveat over the said property. When the plaintiff took the step to lodge the private caveat, she knew that the right or interest she alleged to have over the said property had been threatened and/or infringed. (para 35)

(3) The plaintiff's affidavit in opposing the fifth defendant's application did not verify whether the alleged acknowledgement was given in writing and signed by the deceased. No evidence in a documented form was exhibited by the plaintiff to support the assertion. Given the failure of the plaintiff to exhibit any document to support the acknowledgement claimed by her, the irresistible assumption was that there was no acknowledgement in writing and the depositions remained bare assertions or allegations and mere afterthoughts. (para 40)

(4) Even assuming for a moment that such acknowledgement did exist, the acknowledgement could not be taken as a fresh accrual of action or right of action for two reasons. Firstly, the alleged acknowledgement allegedly made by the deceased on 1 September 2009 was given after the expiry of the limitation period. Here, the plaintiff's right of action or cause of action of 12 years began to run from 9 February 1994 and had lapsed on 9 February 2006. Hence, the acknowledgement was deemed ineffective. Secondly, the alleged acknowledgement was not made by the fifth defendant and as such, the acknowledgement had no consequence on the fifth defendant. The deceased had no authority over the fifth defendant nor was he an agent or representative of the fifth defendant who was capable to give or make an acknowledgement on behalf of the fifth defendant. (para 41)

(5) Since the plaintiff's action was filed on 22 April 2014, 20 years after the date of the plaintiff discovering the alleged fraudulent transactions affecting the plaintiff's right or interest on the said property, the action was clearly time barred by s. 9 of the Act. (para 44)

Case(s) referred to:

Ahmad Said v. Nacharamal D Subramaniam Servai KR KT Supramaniam & Ors [1989] 2 CLJ 1192; [1989] 1 CLJ (Rep) 214 HC ***(refd)***

Bernard Thomazios v. Tharmaraj Ayadurai & Ors [2007] 8 CLJ 358 HC ***(refd)***

Bolo v. Koklan & Ors AIR 1930 PC 270 PC ***(refd)***

Bukit Cerakah Development Sdn Bhd v. L'Grande Development Sdn Bhd [2008] 2 CLJ 645 CA ***(refd)***

Chan Soon Guan & Anor v. Ismail Hj Adnan [2011] 3 CLJ 366 CA ***(refd)***

Credit Corp (M) Bhd v. Fong Tak Sin [1991] 2 CLJ 871; [1991] 1 CLJ (Rep) 69 SC ***(refd)***

Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd [2007] 6 CLJ 741 CA ***(refd)***

Korso Establishment Anstalt v. John Wedge (Transcript No. 14/387) (Unreported) ***(refd)***
Litus Jau & Anor v. Boustead Pelita Tinjar Sdn Bhd & Ors [2014] 1 CLJ 880 CA ***(refd)***
Low Chee & Sons Sdn Bhd & Anor v. Extreme System Sdn Bhd and Another Appeal [2013] 1 MLJ 650 CA ***(refd)***
Lum Kai Keng v. Quek Peng Chai & Ors [2001] 4 SLR 392 ***(refd)***
Malaysian Newprints Industries Sdn Bhd v. Perdana Cigna Insurance Bhd & Ors [2008] 1 CLJ 246 CA ***(refd)***
Ng Chim & Ors v. Low Boon Beng [1994] 3 CLJ 803 SC ***(refd)***
Petroleum Nasional Bhd v. Kerajaan Negeri Terengganu & Another Appeal [2003] 4 CLJ 337 CA ***(refd)***
Ponnusamy & Anor v. Nathu Ram [1958] 1 LNS 46 HC ***(refd)***
Savant-Asia Sdn Bhd v. Sunway PMI-Pile Construction Sdn Bhd [2008] 6 CLJ 681 FC ***(refd)***
Seloga Jaya Sdn Bhd v. UEM Genisys Sdn Bhd [2008] 2 CLJ 686 CA ***(refd)***
Shell Hong Kong Ltd v Yeung Wai Man Kui Yip Co Ltd [2004] 178 HKCU 1 ***(refd)***
State Bank of India v. Murjani Marketing (Transcript 91/0304) (Unreported) ***(refd)***
Tan Hin Choon & Ors v. Ban Hin Lee Bank Ltd [1972] 1 LNS 148 CA ***(refd)***
Tan Kim Beng & Ors v. Datuk Yen Yin Pang & Ors [2012] 1 LNS 1307 CA ***(refd)***
Tan Swee Lan v. Engku Nik Engku Muda & Ors [1973] 1 LNS 156 FC ***(refd)***
Tenaga Nasional Bhd v. Kamarstone Sdn Bhd [2014] 1 CLJ 207 FC ***(refd)***
Thein Hong Teck & Ors v. Mohd Afrizan Hussain & Another Appeal [2012] 1 CLJ 49 FC ***(refd)***
Topland Management Corporation Sdn Bhd & Anor v Bank Negara Malaysia [2005] 1 LNS 381 HC ***(refd)***
Wan Nafi bin Wan Ismail v. Hajjah Lijah bte Omar & Ors [1996] 1 LNS 95 HC ***(refd)***
Watson & Anor v. Dutton Forshaw Motor Group Ltd & Ors [1998] EWCA Civ 1270 ***(refd)***

Legislation referred to:
Companies Act 1965, s. 226(3)
Limitation Act 1953, ss. 9(1), 26, 27
Rules of Court 2012, O. 14A
Rules of the High Court 1980, O. 14A

Other source(s) referred to:
Sweet & Maxwell Asia's Malaysian Civil Procedure 2013 (White Book), p 129

For the plaintiff - Gomathy Balasupramaniam; M/s Ganeson Gomathy & Partners
For the 5th defendant - John Mathew Mathai; M/s Christopher & Lee Ong

Reported by Amutha Suppayah

JUDGMENT

Azimah Omar JC:

[1] On 21 October 2014, I have allowed the fifth defendant's application in respect of encl. 14 for disposal of the plaintiff's action against it on a point of law under O. 14A of the Rules of Court 2012 (ROC 2012).

[2] The question of law posed by the fifth defendant for my determination was this:

> Whether the Plaintiff's purported claim against the fifth defendant herein is time barred pursuant to the Limitation Act 1953.

[3] In addition to the determination of the said question of law, the fifth defendant also *via* its encl. 14 further sought for several consequential orders should the answer to the question of law be in the affirmative. The consequential orders sought by the fifth defendant are as follows:

(a) that the plaintiff's claim against the fifth defendant be dismissed; and

(b) that the plaintiff's claim for reliefs sought in paras. 41(a), (b), (e), (f), (i), (k), (l), (m) and paras. 41(n), (o), (p), (q) of the plaintiff's amended statement of claim against the fifth defendant be disallowed.

[4] Having decided on the said question of law in the affirmative, I have dismissed the plaintiff's action against the fifth defendant, as well as granted order in terms to the consequential orders prayed for by the fifth defendant.

[5] The plaintiff subsequently filed a notice of appeal dated 12 November 2014 appealing against my decision.

[6] Now, I will give the reasons for my decision but before that it is only appropriate for me to briefly state the factual background of the plaintiff's claim as revealed from the pleadings and the affidavits filed before me that give rise to the fifth defendant's application.

(i) The plaintiff, a 74 year old woman by the name of Laksmi i/k Malayandy had commenced an action against the five defendants namely; EK Housing Developer Sdn Bhd (the first defendant), Nallakan a/l Senban (the second defendant), Paruwathy a/p Samynathan (the third defendant), Saraswathi a/p Karuppiah (the fourth defendant) and Malayan Banking Bhd (the fifth defendant);

(ii) the first defendant is a property developer company incorporated under the Companies Act 1965 known as EK Housing Developer Sdn Bhd. The first defendant had been wound up by an order of court on 1 December 2004 and for purposes of pursuing this action, the plaintiff had obtained the required sanction under s. 226(3) of the Companies Act 1965;

(iii) the second and third defendants were the former directors of the first defendant;

(iv) the fourth defendant is the administrator of the estate of one Sin Bin a/l Sinbin (the deceased) and the fifth defendant in this case is a financial banking institution;

(v) in her writ of summons and statement of claim, the plaintiff is claiming against the five defendants for *inter alia* the following reliefs:

(a) Satu perintah Deklarasi bahawa Surat Kuasa Wakil bertarikh 29.05.1989 adalah terbatal dan tidak sah (null and void); dan

(b) Satu Perintah Deklarasi bahawa pindahan hartanah yang dikenali sebagai HS(D) 31005, PT34939, Mukim Daerah Klang, Negeri Selangor yang beralamat No. 34, Taman Sri Meena, Kampung Bukit Naga, Batu 6, Jalan Bukit Kemuning, 40460 Shah Alam di atas nama Defendan Pertama iaitu EK Housing Developer Sdn Bhd dengan menggunakan Surat Kuasa Wakil bertarikh 29.05.1989 adalah terbatal dan tidak sah (null and void); dan

(c) Satu Perintah Deklarasi bahawa pindahan hartanah yang dikenali sebagai HS(D) 31005, PT34939, Mukim Daerah Klang, Negeri;

(d) Hartanah yang dikenali sebagai HS(D) 31005, PT34939, Mukim Daerah Klang, Negeri Selangor yang beralamat No. 34, Taman Sri Meena, Kampung Bukit Naga, Batu 6, Jalan Bukit Kemuning, 40460 Shah Alam tersebut dipindah milik ke atas nama Plaintif tanpa sebarang sekatan; dan

(e) Pendaftar Mahkamah Yang Mulia ini menandatangani dokumen-dokumen yang diperlukan untuk menukarkan hartanah-hartanah yang dikenali sebagai HS(D) 31005, PT34939, Mukim Daerah Klang, Negeri Selangor yang beralamat No. 34, Taman Sri Meena, Kampung Bukit Naga, Batu 6, Jalan Bukit Kemuning, 40460 Shah Alam tersebut ke atas nama Plaintif.

(vi) the plaintiff's case is primarily based on her claim that she is the rightful owner of a piece of property held under HS(D) 31005, PT 34939, Mukim Klang, Daerah Klang, Negeri Selangor (the said property) and it was the plaintiff's pleaded case that sometime in 1987, the first defendant was engaged by the plaintiff as a contractor to build a bungalow on the said land on which the said property was located. For purposes of constructing the bungalow, the plaintiff claimed she had paid an initial sum of RM12,000 and a monthly instalment of RM400 to Thamarajah Enterprise and later to the first defendant until 1993. It was also the plaintiff's pleaded case that the first defendant, the second defendant and the third defendant had fraudulently transferred the said property to the first defendant by way of a forged power of attorney (the said power of attorney) allegedly signed by the plaintiff;

(vii) in respect of the said power of attorney, it was further alleged by the plaintiff that the first defendant had executed a sale and purchase agreement with the deceased wherein the said property was sold and subsequently transferred to the deceased. The plaintiff also alleged that the deceased had also conspired in the fraudulent transactions. The deceased is the present registered owner of the said property; and

(viii) the fifth defendant first came into the picture in 1991 when it extended its loan facility to the first defendant. For security of the said loan, the first defendant, being the registered owner of the said property at that

particular time, had charged the said property to the fifth defendant. When the said property was transferred to the deceased on 6 April 2004, the deceased had also obtained a loan facility from the fifth defendant. The deceased had in turn executed a memorandum of charge in favour of the fifth defendant as security to the loan facility. Currently the fifth defendant is the registered chargee to the said property.

[7] The fifth defendant refuted the plaintiff's claim and in its statement of defence, the fifth defendant denied having any knowledge of most of the allegations pleaded by the plaintiff in her statement of claim, and puts the plaintiff to strict proof of such allegations. In its statement of defence, apart from denying having any knowledge of the plaintiff's pleaded case, the fifth defendant contends that the fifth defendant's interest on the said property as the registered chargee was obtained in good faith and for a valuable consideration. Further, the fifth defendant also pleaded that the plaintiff's claim is time barred and there was laches on the part of the plaintiff in bringing the action against the fifth defendant.

The O. 14A Application By The Fifth Defendant

[8] In support of its application, the fifth defendant filed two affidavits affirmed by K. Jayshee Rani a/p Krishnan on 20 August 2014 and 22 September 2014 namely the affidavit in support of encl. 14 (encl. 15) and affidavit in reply to plaintiff's affidavit in opposition to the plaintiff's application (encl. 24).

[9] In the affidavit in support of the application sworn by K. Jayshee Rani a/p Krishnan, who is the senior executive of the fifth defendant, had stated that the plaintiff knew and/or discovered the alleged forgery and/or fraud at least by 9 February 1994 when the plaintiff lodged a private caveat over the said property. She further stated that the entry of the plaintiff's private caveat over the said property was entered on 9 February 1994 as per the endorsement appearing on the copy of land title of the said property. The copy of the land title of the said property with the caveat's endorsement was exhibited and marked as exh. 'B' in encl. 15. The fifth defendant further adduced that the plaintiff's position in respect of her knowledge, discovery and her awareness of the alleged fraudulent transaction on the said property on February 9th, 1994 (the latest) was also confirmed by a letter dated 2 January 1997 from the previous solicitors of the plaintiff, Messrs. Rina Noor & Co. which was addressed to the fifth defendant, namely exh. 'A'. The contents of exh. 'A' can be summarised as follows:

(i) the plaintiff is the beneficial owner of the said property;

(ii) the said property was charged to the fifth defendant as security for a loan granted to the first defendant without the plaintiff's knowledge;

(iii) the plaintiff had lodged a private caveat over the said property; and

(iv) the plaintiff wished to redeem the said property from the fifth defendant

[10] It was also deposed in the affidavit that the plaintiff's caveat over the said property was subsequently removed by the Shah Alam High Court on 11 March 1999.

[11] The fifth defendant in making this O. 14A application had forwarded three (3) grounds which are:

(i) there are undisputed material and relevant facts unravelled from the pleadings and the affidavits in the present case that give rise to the issue of limitation, chiefly is the fact that the plaintiff knew and/or discovered the alleged forgery and/or fraud at the very least by or on 9 February 1994, when the plaintiff lodged a private caveat over the said property. In view of this undisputed fact that plaintiff discovered the alleged forgery or alleged fraudulent act when she entered the private caveat, the right of action vested on the plaintiff against the fifth defendant had accrued on 9 February 1994, and thus the plaintiff's action against the fifth defendant is therefore time barred pursuant to the Limitation Act 1953;

(ii) the aforesaid question of law relating to issue of limitation, a defence which is relied on by the fifth defendant is suitable for its determination under Order 14A; and

(iii) the determination of the aforesaid question of law if answered in the affirmative would have the effect of determining or disposing of the plaintiff's entire cause of action against the fifth defendant.

Submission By The Fifth Defendant's Counsel

[12] It was submitted on behalf of the fifth defendant that the plaintiff's purported claim is premised on the basis that the said property was allegedly transferred to the first defendant and later to the deceased by way of a forged power of attorney. And hence, the plaintiff's purported claim against all the five defendants is an action for recovery of the land, namely the said property. For a claim for recovery of land, s. 9(1) of the Limitation Act 1953 (the Act) provides that such action must be brought before the expiration of twelve (12) years from the date on which the right of action accrued to the plaintiff.

[13] The counsel for the fifth defendant submitted that the phrases 'right of action' and 'cause of action' have of the same meaning. On this contention the counsel had brought to my attention two authorities namely, *Credit Corp (M) Bhd v. Fong Tak Sin* [1991] 2 CLJ 871; [1991] 1 CLJ (Rep) 69; [1991] 1 MLJ 409 and *Tenaga Nasional Bhd v. Kamarstone Sdn Bhd* [2014] 1 CLJ 207; [2014] 2 MLJ 749. (See (i) *Credit Corp (M) Bhd v. Fong Tak Sin* [1991] 2 CLJ 871; [1991] 1 CLJ (Rep) 69; [1991] 1 MLJ 409. The Supreme Court had held

in this case at p. 411: "From established authorities we can now accept that the cause of action normally accrues when there is in existence a person who can sue and another who can be sued, and when all the facts have happened which are material to be proved to entitle the plaintiff to succeed". (ii) *Tenaga Nasional Bhd v. Kamarstone Sdn Bhd* [2014] 1 CLJ 207; [2014] 2 MLJ 749. The Federal Court held at pp. 758 to 759: "[15] In *Nasri v. Mesah* [1971] 1 MLJ 32, the Federal Court per Gill FJ, as he then was, depicted 'a cause of action' as follows … [16] Gill FJ, then thus enunciated on 'the date of accrual' in the case of a debt: … It would seem clear, therefore, that the expressions 'the right to sue accrues', 'the cause of action accrues' and 'the right accrues' mean one and the same thing when one speaks of the time from which the period of limitation as prescribed by law should run. (emphasis added.) [17] And *Nasri v. Mesah*, we observe, is still good law (see the Federal Court cases … which followed *Nasri v. Mesah*) which we readily endorse").

[14] In the present case, it was argued by counsel for the fifth defendant that the plaintiff's right of action had accrued the latest on 9 February 1994. The fifth defendant's counsel further argued that it is not disputed that plaintiff had lodged a caveat on the said property on 9 February 1994 when she had discovered or came to know or became aware of alleged fraud and/or alleged forgery. It was further submitted by the fifth defendant's counsel that the plaintiff's position in respect her knowledge or discovery or awareness of the fraudulent transactions was reflected in the contents of Messrs Rina Noor & Co's letter dated 2 January 1997 to the fifth defendant. Further, it was submitted on behalf of the fifth defendant that the plaintiff herself in para. 10 of her affidavit in reply 1 (encl. 22 - affidavit in opposing the fifth defendant's application) had admitted caveating the said property on 9 February 1994 and she had the intention to redeem the said property from the fifth defendant. Additionally, in para. 12.1 of the same affidavit the plaintiff had affirmed and stated that she knew as early as 9 February 1994 that the first defendant had charged the said property to the fifth defendant.

[15] Thus, it is the contention of the fifth defendant's counsel that the date 9 February 1994 is the latest date on which the right of action accrued to the plaintiff. Since the time vested on the plaintiff to initiate her action is governed by s. 9(1) of the Act and the limitation period provided under the statute is 12 years, the plaintiff's purported claim to recover the said property against the fifth defendant is therefore time barred as the plaintiff had only filed this action in 2014, which is 20 years since 9 February 1994.

[16] It was also argued by counsel for the fifth defendant that the issue for determination or construction before this court is the issue of limitation on whether the plaintiff's action against the fifth defendant is time barred pursuant to s. 9 of the Act, and therefore the issue is appropriately or suitably dealt with *via* an O. 14A application. The counsel for the fifth defendant had relied on two reported cases which have determined the issue of limitation

pursuant to O. 14A of the Rules of the High Court 1980 which is identical with the O. 14A ROC 2012. (See: (i) *Litus Jau & Anor v. Boustead Pelita Tinjar Sdn Bhd & Ors* [2014] 1 CLJ 880; [2014] 1 MLJ 794, Court of Appeal (ii) *Topland Management Corporation Sdn Bhd & Anor v. Bank Negara Malaysia* [2005] 1 LNS 381 (Kuala Lumpur High Court Suit No.D2-22-891-2001)).

Submission By The Plaintiff's Counsel

[17] In resisting the fifth defendant's application, it was argued on behalf of the plaintiff that this present matter is not an appropriate matter to be determined under O. 14A of the ROC 2012 on the following grounds:

(i) there are serious disputes of facts between the plaintiff and the fifth defendant with regards to the ownership of the land, transfer of the land, charge, negligence, breach of statutory duty and limitation; and

(ii) the plaintiff's action or claim is not time barred as there was an acknowledgement by the deceased on 1 September 2009 to the plaintiff to settle the redemption sum to the fifth defendant and after the settlement of the redemption sum, the deceased will then transfer the land to the plaintiff. Relying on s. 26 of the Act, the plaintiff contends there was fresh accrual of action and thus, the filing of this present action by the plaintiff on 22 April 2014 is still within the limitation period as time will only lapse on 1 September 2021.

[18] It was further submitted by the plaintiff's counsel in support of the first ground that in the present case there existed conflicting allegations of facts and the issues of facts are also interwoven on the legal issues. For this contention, counsel for the plaintiff had in his written submission set out all the pleaded facts in the statement of claim and the plaintiff's depositions in the plaintiff's affidavit in opposing the O. 14A application. The plaintiff's counsel had even tabulated in his written submission the plaintiff's version and defendant's version of facts in respect of the matter before me, in order to convince me that there exists conflicting facts.

[19] In respect of the acknowledgement made by the deceased, it was the argument of the plaintiff's counsel that this acknowledgement triggered a fresh accrual of action.

[20] It was further submitted by the plaintiff's counsel that the conflicting facts can only be put to rest by way of a full trial upon examination of witnesses. The plaintiff's counsel further submitted that the plaintiff, her son Balasubramaniam and the deceased's administrator have yet to be heard on the fact of the acknowledgement and thus plaintiff's suit against the fifth defendant should not be dismissed based on an O. 14A application. The plaintiff's counsel had referred me to several cases and authorities. (See (i) *Low Chee & Sons Sdn Bhd & Anor v. Extreme System Sdn Bhd and Another Appeal* [2013] 1 MLJ 650. (ii) *Bukit Cerakah Development Sdn Bhd v. L'Grande Development Sdn Bhd* [2008] 2 CLJ 645; [2008] 3 MLJ 547. (iii) *Thein Hong*

Teck & Ors v. Mohd Afrizan Hussain & Another Appeal [2012] 1 CLJ 49; [2012] 2 MLJ 299 FC. (iv) *Bernard Thomazios v. Tharmaraj Ayadurai & Ors* [2007] 8 CLJ 358; [2007] 8 MLJ 519. (v) *Tan Kim Beng & Ors v. Datuk Yen Yin Pang & Ors* [2012] 1 LNS 1307)

The Law On Order 14A Application

[21] Order 14A of the ROC 2012 reads as follows:

Determination of questions of law or construction (O. 14A, r.1)

1. (1) The Court may, upon the application of a party or of its own motion, determine any question of law or construction of any document arising in any cause or matter at any stage of the proceedings where it appears to the Court that -

(a) such question is suitable for determination without the full trial of the action; and

(b) such determination will finally determine the entire cause or matter or any claim or issue therein.

(2) On such determination the Court may dismiss the cause or matter or make such order or judgment as it thinks just.

(3) The Court shall not determine any question under this Order unless the parties have had an opportunity of being heard on the question.

(4) The jurisdiction of the Court under this Order may be exercised by a Registrar.

(5) Nothing in this Order shall limit the powers of the Court under Order 18, rule 19 or any other provisions of these Rules.

[22] In essence, O. 14A provides jurisdiction for the court to determine and dispose a case summarily on a point of law. It is trite law that O. 14A becomes relevant where:

(a) A suitable test to apply is whether all necessary and material facts have been duly admitted; and

(b) Where the point of law depends on the construction of relevant documents and facts in their context.

In other words, the court is perfectly entitled to make actual determination on any question of law posed to it, or to determine the construction of any documents, and consequential of to such determination thereafter makes a decision on whether to allow or dismiss the action in an O. 14A application.

[23] In the case of *Petroleum Nasional Bhd v. Kerajaan Negeri Terengganu & Another Appeal* [2003] 5 AMR 735; [2004] 1 MLJ 8; [2003] 4 CLJ 337, the Court of Appeal had referred to the principles relating to an application under O. 14A laid down by an English Court of Appeal in the case of *Korso Establishment Anstalt v. John Wedge* (unreported: February 15, 1994:

Transcript No.14/387, CA). The principles relating to an application under O. 14A propounded in the case of *Korso Establishment Anstalt* are that an O. 14A application is appropriate if:

(a) An issue is "a disputed point of fact or law relied on by way of claim or defence".

(b) A question of construction is well capable of constituting an issue;

(c) If a question of construction will finally determine whether an important issue is suitable for determination under O. 14A and whether it is a dominant feature of the case a court ought to proceed to so determine such issue; and

(d) Respondents to an application under O. 14A are not entitled to contend they should be allowed to hunt around for evidence or something that might turn up on discovery which could be relied upon to explain or modify the meaning of the relevant document. If there were material circumstances of which court should take account in construing the document, they must be taken to have been known, and could only be such as were known, to the parties when the agreement was made. In the absence of such evidence the court should not refrain from dealing with the application.

[24] In *Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd* [2007] 6 CLJ 741; [2008] 2 MLJ 812, it was held by the Court of Appeal that for the court to exercise its power to summarily dispose of an action under O. 14A there should not be any dispute by the parties as to the relevant facts, or that the court upon scrutinizing the pleadings, concludes that the material facts are not in dispute.

[25] In *Sweet & Maxwell Asia's Malaysian Civil Procedure 2013 (White Book)* at p. 129, O. 14A is not appropriate avenue in the following cases:

(a) if there are conflicting allegations of facts. All material facts relating to the subject matter of the claim must be undisputed or admitted; and not on the basis of assumed facts: *Low Chee & Sons Sdn Bhd & Anor v. Extreme System Sdn Bhd and Another Appeal* [2012] 2 AMR 704; [2013] 1 MLJ 650; *Savant-Asia Sdn Bhd v. Sunway PMI-Pile Construction Sdn Bhd* [2008] 6 CLJ 681; [2008] 6 AMR 640; [2009] 5 MLJ 754 FC; *Bukit Cerakah Development Sdn Bhd v. L'Grande Development Sdn Bhd* [2008] 2 CLJ 645; [2008] 2 AMR 597; [2008] 3 MLJ 547; *Malaysian Newsprint Industries Sdn Bhd v. Perdana Cigna Insurance Bhd & Ors* [2008] 1 CLJ 246; [2008] 1 AMR 672; [2008] 2 MLJ 256; *Seloga Jaya Sdn Bhd v. UEM Genisys Sdn Bhd* [2008] 2 CLJ 686; [2008] 2 AMR 477; [2007] 7 MLJ 385 CA; and

(b) if the issue of fact are interwoven with legal issues raised. The court will not split the legal and factual determination for to do so would in effect be to give rulings in vacuum or on a hypothetical ruling: *Thein Hong Teck & Ors v. Mohd Afrizan Hussain & Another Appeal* [2012] 1 CLJ 49; [2012] 1 AMR 489; [2012] 2 MLJ 299 FC; *Bernard Thomazios v. Tharmaraj Ayadurai & Ors* [2007] 8 CLJ 358; [2007] AMEJ 0101; [2007] 8 MLJ 519; *Lum Kai Keng v. Quek Peng Chai & Ors* [2001] 4 SLR 392; *State Bank of India v. Murjani Marketing* (unreported; March 1, 1991, Transcript 91/0304), CA (Eng) per Taylor, LJ; *Watson & Anor v. Dutton Forshaw Motor Group Ltd & Ors* [1998] EWCA Civ 1270 (unreported; July 22, (1998), CA (Eng); and *Shell Hong Kong Ltd v. Yeung Wai Man Kui Yip Co Ltd* [2004] 178 HKCU 1 (decision on April 2, 2004), CA (HK).

[26] Having set out the relevant laws and myriad of authorities relating to an O. 14A application, I shall now return to the present case. First, I must consider whether the facts and issues from the affidavits and documentary evidence presented by the parties before me are suitable and appropriate to be adjudicated summarily under O. 14A. To do that, I have to first determine whether there are undisputed or admitted material facts and whether these undisputed material and relevant facts concern an issue or question of law which can be dealt with based on the undisputed evidence. I must also consider whether the determination of the question of law can determine the entire matter before me.

[27] It must be borne in mind that the O. 14A application before me is the application by the fifth defendant who is the present registered chargee of the said property of which the deceased is the registered owner. It must also be noted that the fifth defendant was also the registered chargee of the said property when the plaintiff registered her private caveat over the said property on 9 February 1994. The registered owner of land title at that particular time was the first defendant. It is clear from the reliefs sought in para. 41 of the plaintiff's statement of claim in which some of the reliefs claimed I have mentioned in para. 6.5 of my judgment, that the plaintiff's action before me is an action to recover land. Therefore the time limited for the plaintiff to file her action is 12 years pursuant to s. 9(1) of the Limitation Act from the date when right of action accrued. (See (i) *Ponnusamy & Anor v. Nathu Ram* [1958] 1 LNS 46; [1959] MLJ 86, (ii) *Ahmad Said v. Nacharamal D Subramaniam Servai KR KT Supramaniam & Ors* [1989] 2 CLJ 1192; [1989] 1 CLJ (Rep) 214, (iii) *Tan Swee Lan v. Engku Nik Binti Engku Muda & Ors* [1973] 1 LNS 156; [1973] 2 MLJ 187, (iv) *Ng Chim & Ors v. Low Boon Beng* [1994] 3 CLJ 803, (v) *Chan Soon Guan & Anor v. Ismail Hj Adnan* [2011] 3 CLJ 366)

[28] Having established that the time limited for the plaintiff to bring her action against the fifth defendant is 12 years from the date when the right of action accrued, I will now consider the pleadings and affidavits filed by both

the fifth defendant and the plaintiff in respect of the O. 14A application and whether the plaintiff had brought her action before the expiration of twelve (12) years from the date on which the right of action accrued to the plaintiff.

[29] From the facts revealed in the pleadings and affidavits together with the documentary evidence found in the exhibits, I am in agreement with counsel for the fifth defendant that the material and relevant facts on the date of accrual of the plaintiff's right of action is undisputed. In the present case the question of when does the plaintiff's right of action or cause of action accrues or starts to run which concerns the issue of limitation can be dealt by the undisputed evidence before me.

[30] It is trite law that in an action to recover land, the right of action accrues when there was an infringement of such right or at least clear and unequivocal threat to infringe that right by the defendant against whom the suit is instituted. There is a long line of cases that have decided on this position of law. Suffice for me to cite some of them here.

[31] In the case of *Tan Swee Lan v. Engku Nik Binti Engku Muda & Ors* [1973] 1 LNS 156; [1973] 2 MLJ 187, in an action for specific performance of an agreement for sale of land where the defendant had raised the defence of limitation, the Federal Court in its judgment had quoted the words of Sir Binod Mitter in the Privy Council case of *Bolo v. Koklan & Ors* AIR 1930 PC 270 at p. 188:

> There can be no 'right to sue' until there is an accrual of, the right asserted in the suit and its infringement or at least clear and unequivocal threat to infringe that right by the defendant against whom the suit is instituted.

[32] In *Ng Chim & Ors v. Low Boon Beng* [1994] 3 CLJ 803 the Supreme Court at pp. 804 to 805 held as follows:

> It would have been a straight forward case under s. 9(1) of the Limitation Act because *the evidence shows that on 20 May 1972 the plaintiffs were aware and knew of the fact that the defendant had become the sole registered proprietor of the two pieces of land. The date, 20 May 1972 is the date on which the right of action accrued to the Plaintiffs,* and when in 1988 they filed this suit for a declaration that they were still the owners of their respective shares in the lands, 16 years had elapsed, ie, they were 4 years outside the limitation period. (emphasis added)

[33] The Court of Appeal in *Chan Soon Guan & Anor v. Ismail Hj Adnan* [2011] 3 CLJ 366 held at p. 371:

> [12] Pursuant to s. 9 of the Limitation Act, no action can be brought to recover any land after the expiration of 12 years from the date on which the right of action accrued. In the present appeal before us, the Plaintiff admits that in late 1979 or early 1980 he became aware that the said properties were transferred to the 2nd Defendant. We are unanimous that this is the material date upon which the plaintiff's cause of action arose to recover the said lands. Further, in respect of the alleged loan

agreement, assuming there is proved to be one, we are unanimous that pursuant to s. 6 of the Limitation Act, the plaintiff's cause of action arose from the same date referred to above (ie, late 1979 or early 1980) but limited to a period of six years.

[13] We are unanimous that the plaintiff's 2nd suit is caught by the statutory limitation for actions based on contract under s. 6 of the Limitation Act as well as the statutory limitation for recovery of land (based on fraud or otherwise) under s. 9 of the same Act. We are unanimous that the plaintiff's causes of action, if any, are barred by the Limitation Act.)

[34] In *Wan Nafi bin Wan Ismail v. Hajjah Lijah bte Omar & Ors* [1996] 1 LNS 95; [1996] 5 MLJ 534, the Court held at p. 540:

> The Plaintiff filed the suit on 8 July 1989. He claimed he came to have known about the land only in 1972 when he approached DW2 for the return of his land. On the basis of exh D1, he could not now be heard to say that he knew about the land only in 1972. He knew about it as far back as 31 January 1955 at the time when the transfer was affected. He was the one who transferred the land for value. He only activated his right in 1989, that is 34 years later. Even assuming that his ignorance of the transfer of his land is genuine and that he became aware and knew about it only in 1972, that is 17 years before he filed the suit, nevertheless, he was still five years beyond the limitation period (see judgment of Eusoff Chin J (as he then was, now Yang Amat Arif Chief Justice of the Federal Court) in *Ng Chim & Ors v. Low Boon Beng* [1994] 3 AMR 1959 at p 1963). The nature of the claim of the plaintiff is of an action for the recovery of land. Being such a cause of action, it falls within s 9(1) of the Act which, *inter alia*, bars any action being brought after the expiration of 12 years from the date on which the right of action accrued to him (see *Ponnusamy & Anor v. Nathu Ram* [1959] MLJ 86; *Ahmad bin Said v. Nacharamal w/o D Subramaniam & Ors* [1989] 2 CLJ 1192). The concept of limitation is that there must be an end to litigation (per Abdul Malek J (as he then was) in *Tengku Ali ibni Almarhum Sultan Sulaiman v. Kerajaan Negeri Terengganu Darul Iman* [1996] 4 MLJ 37

[35] In the case before me, I agree with counsel for the fifth defendant that it was not disputed that the plaintiff knew and/or discovered the alleged forgery and/or fraud at least by 9 February 1994 when she lodged a private caveat over the said property. When the plaintiff took the step to lodge the private caveat, she knew that her right or interest she alleged to have over the said property had been threatened and/or infringed. In order to protect such interest and/or right, registering a caveat over the said property was the most sensible thing to do. At the material time when registration of the caveat was executed as appeared in exh. 'B' of (15), the plaintiff also knew that the land was registered under the name of the first defendant, and the land title also states the charge registered by the fifth defendant. The appearance of the charge by the fifth defendant on the land title and the fact that the first defendant was named the registered owner at that material time, clearly

shows that there was an infringement of the plaintiff's right and/or interest on the said property and that prompted the plaintiff to lodge the private caveat. However, besides caveating the land, the plaintiff did nothing more. Three years later in 1997, a letter then came from the plaintiff's previous solicitors addressed to the fifth defendant confirming her act of caveating the said property on 9 February 1994 and further claimed she is the beneficial owner of the said property. In that letter, she also claimed that the said property was charged by the first defendant as a security for loan to the fifth defendant without her knowledge and she wished to redeem the said property from the fifth defendant. I must say that this letter fortified the fact that the plaintiff had all along, since 9 February 1994, knew or had discovered or was aware of the fraudulent transactions affecting her right or interest on the said property. The plaintiff's position was further confirmed by her own admission in her own affidavit ie, encl. 22 in paras. 10.1 and 12.1.

[36] The other ground forwarded by the plaintiff in resisting the O. 14A application in relating to the limitation period is that there was a fresh accrual of action by acknowledgement pursuant to s. 26 of the Limitation Act. The plaintiff pleaded in her statement of claim and asserted the same in her affidavit encl. 22 that the deceased had acknowledged on 1 September 2009 that there was fraudulent act on his part over the said property and had given his promise to the plaintiff that he will transfer and register the said property to the plaintiff. I shall first reproduce the relevant portion of encl. 22 relating the acknowledgement:

> Saya menegaskan bahawa, pada kesemua masa yang material Simati telah berjanji kepada saya untuk memindahmilik hartanah tersebut ke atas nama saya. Saya juga selalu berulang alik ke rumah Simati, dan setiap kali Simati telah berjanji bahawa Simati akan memindahmilik hartanah tersebut ke atas nama saya.
>
> Saya dengan segala hormatnya menyatakan di sini bahawa, saya telah mempercayai kata-kata Simati kerana Simati merupakan darah daging saya sendiri dalam mana, Simati merupakan adik saudara saya.
>
> Saya tidak mengambil sebarang tindakan berdasarkan kepada janji Simati dan menunggu untuk hartanah tersebut dipindakmilik oleh Simati kepada Plaintif.
>
> Saya menekankan bahawa, Simati sehingga tahun 2009 tidak memindahmilik hartanah tersebut. Maka, anak saya Subramaniam telah berjumpa dengan Simati pada 1 September 2009 dan mengarahkan Simati supaya menyelesaikan isu rumah saya dengan segera dalam mana, Simati telah memberikan janjinya yang terakhir untuk memindahmilik hartanah tersebut ke atas nama saya.
>
> Secara lanjutnya, saya menegaskan bahawa, Simati telah membawa saya dan Balasubramaniam ke Ibu Pejabat Defendan Ke-5 untuk membincangkan mengenai isu hartanah tersebut; dalam mana Simati telah berjanji untuk membayar hutang yang tertunggak terhadap hartanah tersebut dan memindahmilik hartanah tersebut ke atas nama saya.

A Akan tetapi, saya menekankan bahawa, Simati telah meninggal dunia pada 3 Oktober 2010.

[37] By this acknowledgement it was submitted that the plaintiff's cause of action or plaintiff's right of action had accrued afresh, and only start to run from 1 September 2009 and will lapse in 2021. Hence, it was argued by the B plaintiff that her action was filed well within the permitted time.

[38] The law on fresh accrual of action by acknowledgement or part payment under s. 26 of the Limitation 1953 is trite and settled. Section 26 reads as follows:

C **Section 26. Fresh accrual of action on acknowledgment or part payment.**

(1) Where there has accrued any right of action to recover land or to enforce a mortgage or charge in respect of land or personal property, and -

(a) the person in possession of the land or personal property acknowledges the title of the person to whom the right of action has D accrued; or

(b) in the case of any such action by a mortgagee or chargee the person in possession as aforesaid or the person liable for the debt secured by the mortgage or charge makes any payment in respect thereof, whether principal or interest, the right shall be deemed to have E accrued on and not before the date of the acknowledgment or last payment.

Section 26 must be read together with the preceding s. 27. Section 27 reads as follows:

Section 27. Formal provisions as to acknowledgments and part F **payments.**

(1) Every such acknowledgment as is referred to in section 26 or in the proviso to section 16 of this Act shall be in writing and signed by the person making the acknowledgment.

G (2) Any such acknowledgment or payment as is referred to in section 26 or the proviso to section 16 of this Act may be made by the agent of the person by whom it is required to be made under that section, and shall be made to the person, or to an agent of the person, whose title or claim is being acknowledged or, as the case may be, in respect of whose claim the payment is being made.

H **[39]** In the case which was brought to my attention by the fifth defendant's counsel, the case of *Tenaga Nasional Bhd v. Kamarstone Sdn Bhd* [2014] 1 CLJ 207; [2014] 2 MLJ 749, the Federal Court in this case had emphasised the legal provision of s. 27 which sets out the manner of acknowledgement required under s. 26 and held this at p. 766:

I [28] Section 27 of the Act provides that the aforesaid acknowledgement **must be in writing** and duly signed by the person making it:

(a) Every such acknowledgment as is referred to in section 26 or in the proviso to section 16 of this Act shall be in writing and signed by the person making the acknowledgment.

(b) Any such acknowledgment or payment as is referred to in section 26 or the proviso to section 16 of this Act may be made by the agent of the person by whom it is required to be made under that section, and shall be made to the person, or to an agent of the person, whose title or claim is being acknowledged or, as the case may be, in respect of whose claim the payment is being made. (emphasis added)

[40] I agree with counsel for fifth defendant that in the present case, encl. 22 (the plaintiff's affidavit in opposing the fifth defendant's application) did not even verify whether the alleged acknowledgement was given in writing and signed by the deceased. In this regard, it must be noted that the plaintiff had deposed this acknowledgement in her affidavit by mere assertion of such acknowledgement in the affidavit. No evidence in a documented form was exhibited by the plaintiff to support the assertion. Given the failure of the plaintiff to exhibit any document to support the acknowledgement claimed by her, the irresistible assumption is that there was no acknowledgement in writing and the depositions remained bare assertions or allegations and mere afterthoughts. More so in the present case the person who was alleged to had made the acknowledgement has since passed away and evidence in rebuttal would be impossible.

[41] Even assuming for a moment that such acknowledgement did exist, the acknowledgement could not be taken as a fresh accrual of action or right of action for two reasons. Firstly, the alleged acknowledgement allegedly made by the deceased on 1 September 2009 was given after the expiry of the limitation period. Here, the plaintiff's right of action or cause of action of 12 years begun to run from 9 February 1994 and had lapsed on 9 February 2006. Hence, the acknowledgement is deemed ineffective. The Singapore Court of Appeal in the case of *Tan Hin Choon & Ors v. Ban Hin Lee Bank Ltd* [1972] 1 LNS 148; [1972] 2 MLJ 211 in adopting the English courts' decision on acknowledgement made after the expiry of the limitation period, held this at p. 216:

> *Wright v. Pepin* [1954] 2 All ER 52 at pages 55, 56 is authority for the proposition that the old rule stated in *In re Alison and Sanders v. Sanders* (1881) 19 Ch D 373 that an acknowledgement after expiry of the limitation period is effective still applies,

Secondly, as aptly submitted by counsel for the fifth defendant the alleged acknowledgement was not made by the fifth defendant and as such the acknowledgement has no consequence on the fifth defendant. The deceased was the borrower of the loan obtained from the fifth defendant, and his relationship with the fifth defendant was merely on the basis of a customer

and banker relationship. I must add that the deceased has no authority over the fifth defendant nor was he an agent or representative of the fifth defendant who is capable to give or make an acknowledgement on behalf of the fifth defendant.

[42] I agree with the submission of counsel for the fifth defendant that the long list of facts set out by the plaintiff to show that there was conflicting allegation of facts or dispute of facts has no bearing on the determination of the question of law posed before me. To determine the question of law on the issue of limitation, it is abundantly clear in the present case that material and relevant facts relating to the time of the accrual of plaintiff's right of action was not in dispute. The plaintiff had not disputed such fact, and I emphasis there was plain and obvious admission by the plaintiff on those facts. In my view the only issue that requires my determination and adjudication is whether the plaintiff's purported claim against the fifth defendant herein is time barred pursuant to the Limitation Act 1953.

[43] The next question to consider is whether based on the affidavit evidence filed before this court, does the issue of limitation as posed by the fifth defendant dispose of the whole matter or the entire action if determined by the court.

[44] Based on the reasons above, since the plaintiff's action was filed on 22 April 2014, twenty years after the date (the latest date) of the plaintiff discovering the alleged fraudulent transactions affecting the plaintiff's right or interest on the said property, the action, in my view, is clearly time barred by s. 9 of the Limitation Act 1953. Thus my answer to the question posed is in the affirmative. Consequential to the above findings, I have allowed the fifth defendant's application in encl. 14 and granted order in terms for the prayers herein.

As To Costs

[45] After hearing brief submissions from both counsel on the issue of costs, I had made an order that the plaintiff do pay the fifth defendant costs of RM10,000.